



Cross Border Cooperation and Information Exchange

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Role and Functions

- The BVI FSC is a body corporate established under section 3 of the Financial Services Commission Act
- The FSC's main function is to supervise and regulate persons in the financial services industry in accordance with the Financial Services Commission Act and the financial services legislation



Focus of Presentation

- The purposes/ benefits of cross border co-operation and information exchange
- The FSC's information exchange and international cooperation powers
- Difficulties encountered in exercising those powers
- Limitations on the use by third parties of information obtained in the exercise of the powers



Purposes of Co-operation

- To allow regulators to assist in improving the stability and effectiveness of financial services
- To allow regulators to exclude from the financial system those who may abuse it
- To facilitate a seamless and expeditious flow of information between financial sector regulators, the private sector and law enforcement agencies



Legislative Framework

- Financial Service Commission Act, 2001
- Financial Services (International Co-operation) Act, 2000



Prohibition on Disclosure

- General prohibition on the disclosure of confidential information under sections 29(1) and 49(1) of FSC Act
- Comprehensive definition of confidential information under both sections



Section 29(1)

- Any information, document, record, statement or thing made or disclosed to the Commission in the course of discharging any function or duty



Section 49(1)

Information acquired in the exercise or performance of the Commission's powers or duties and relating to

- the affairs of the Commission
- any application made to the Commission under this Act or pursuant to a financial services legislation
- the affairs of a regulated person or a customer, client or agent of the regulated person or other person benefiting from the work of the regulated person



To whom does the prohibition apply

Under section 29(1)

- The Commission
- The Board
- A member of the Licensing and Supervisory Committee
- Any person acting under the authority of the above entities



Section 49(1)

- Commissioner (Managing Director and member of the Board)
- Officer
- Employee
- Agent
- Adviser



Gateway Provisions – sections 29(2) and 49(2)

- Comprehensive list of instances where disclosure may legitimately be allowed; and
- The persons to whom disclosure may be made



Gateways Provisions

- To any person for the purpose of discharging any duty or exercising any power under the Act or other financial services legislation
- On the order of a court of competent jurisdiction for criminal or civil proceedings



Gateway Provisions

For legal assistance in investigating criminal activity on a request by

- a competent authority in an international organization recognised by the Board;
- a law enforcement authority in a country or jurisdiction approved by the Board



Gateway Provisions

- To assist a foreign regulatory authority in a country or jurisdiction approved by the Board in discharging regulatory duties corresponding to those under the FSC Act or other financial services legislation



Gateway Provisions

- Where disclosure is made to an international organization, foreign regulatory authority or law enforcement authority the prior written consent of the Board is required for further disclosure
- Commission requires written undertaking to this effect



Gateways Provisions

To any person for the purpose of

- disciplinary proceedings, whether within or outside the Territory, relating to the discharge by a legal practitioner, auditor, accountant, valuer or actuary of his professional duties
- disciplinary proceedings against a public officer, employee of the Commission or member of the Board



Gateway Provisions

For legal proceedings in connection with the winding up of a regulated person or the appointment of a receiver



Compulsory Powers

- Where the Commission receives a request for assistance it obtains the requested information by use of compulsory powers under the FSC Act or the FS(IC) Act.



Exercise of Compulsory Powers

- By the Commission where information is reasonably required for the purpose of discharging its functions or ensuring compliance with any financial services legislation (s. 32(1))
- By the Board for the purpose of discharging its functions (s. 30(1))



Persons against whom powers are exercisable

- A regulated person
- A former regulated person
- A person connected with a regulated person
- A person carrying on financial services business
- A person reasonably believed to have the required information or documents



Penalties for Breach

Disclosure of confidential information contrary to the Act is an offence punishable

- on summary conviction by a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 3 years
- on indictment by a fine not exceeding \$25,000 or to imprisonment for a term not exceeding 5 years or both



Immunity from Suit

Where disclosure made

- under the gateway provisions of section 29(2)
- pursuant to a request by the Board under section 30(1)
- pursuant to a notice by the Commission under section 32(1)



Financial Services (International Co-operation) Act

Legal framework for FSC

- to provide assistance to foreign regulatory authorities
- to obtain confidential information pursuant to requests for assistance
- to disclose confidential information obtained under the Act



Disclosure of Confidential Information

FSC may direct in writing any person

- To furnish information
- To produce documents
- To provide assistance



Enforcing Compliance

- Failure to comply with a direction within 3 days or such longer period as the FSC may permit entitles the FSC to apply to a Magistrate for an order
- Application must be processed by the Magistrate within 7 days
- Failure to comply with an order of the Magistrate is an offence



Immunity from suit

No suit shall lie against a person who discloses information, produces documents or renders assistance in relation to a request



Restrictions on Disclosure

- Information supplied or obtained under the Act may not be disclosed by the primary recipient without the consent of the person from whom the information was obtained and, if different, the person to whom it relates
- Primary recipient – the FSC or a person authorised by the FSC or any officer or servant of such person



Gateway Provisions

- To institute criminal or disciplinary proceedings
- To carry out any duty under any law or international agreement
- To assist a competent authority to discharge its functions under any enactment
- To assist a foreign regulatory authority for the purposes of its regulatory functions



Limitations on Use of Information

Answers provided by a person in the exercise of powers under the Act may not be used in criminal proceedings against that person except proceedings for perjury or for failure to disclose a material fact in administrative, regulatory or judicial proceedings



Difficulties Encountered

Objection to seeking approval of the FSC's Board to disclose information to third parties on the basis of:

- Conflict in provisions between laws of requesting authority and BVI laws
- Lack of understanding of BVI laws
- Scepticism that approval may not be granted



Difficulties Encountered

- Difficulties resolved by amending the undertaking to meet the legal requirements of both parties
- Developing relationship of mutual trust and co-operation



Difficulties Encountered

- Failure to provide immunity - FSC Act amended to confer immunity
- Lack of forthrightness by requesting authority – failure to disclose ongoing discussions with Attorneys for regulated entity
- Requesting authority overstepping boundaries – making direct contact with regulated entity

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Conclusion

- Existing arrangements work well in practice
- Legislative scheme contains effective mechanisms to facilitate sound regulatory practices and to protect legitimate interests